Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	**CC Docket No. 98-56** **RM-9101**

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association), a trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, hereby replies to selected comments submitted by various local exchange carriers and their representatives objecting to the model performance measurements and reporting requirements proposed by the Commission in this proceeding. TRA here urges the Commission to hold firm in its resolve to "establish[] an objective manner through which an incumbent's compliance with its statutory obligations can be observed." As the Commission has recognized, "[m]andating nondiscriminatory access" is a far cry from "achieving it in practice." More than two years following enactment of the Telecommunications Act, no major incumbent LEC is providing nondiscriminatory access to OSS consistent with the requirements of Section 251(c) of the Communications Act. The Commission is correct that "[p]erformance measurements and reporting requirements should make much more transparent, or observable" the failure of the incumbent LECs to do so. Increased visibility will, as the Commission has noted, "provide an important incentive for incumbent LECs to comply with the statutory nondiscrimination and just and reasonable requirements" by "increas[ing] the risk . . . [that] statutory violations [will be detected]."

As TRA will demonstrate herein, Congress "expressly called for the FCC's participation" in implementing the Telecommunications Act's network unbundling and resale requirements. Developing performance measurements and associated reporting requirements are no less a part of this implementation process than are determinations of the circumstances in which network unbundling is technically feasible and necessary or in which resale restrictions would allow incumbent LECs to circumvent their resale obligations, each of which has been expressly held by

the U.S. Court of Appeals for the Eighth Circuit to fall squarely within the Commission's jurisdictional authority. Accordingly, the Commission not only has authority to promulgate nonbinding, but mandatory, performance measurements and reporting requirements.

Incumbent LEC claims to the contrary notwithstanding, the *Notice of Proposed Rulemaking* by which the Commission has proposed to adopt model performance measurements and reporting requirements is procedurally sound. The Commission has substantial discretion in structuring its procedures so long as it provides interested parties the process they are due under the law, which it has clearly done here. Moreover, the Commission's election to proceed with a rulemaking vehicle in this instance makes eminent sense given that it might here or at some future time opt to promulgate legally-binding performance measurements and reporting requirements.

Performance measurements and reporting requirements are not only necessary, but critical at this juncture. Efforts by the hundreds of TRA resale carrier members that have ventured into the local market have been, and continue to be, stymied by, among other things, deficiencies in incumbent LEC operations support systems. The continuing failure by incumbent LECs to provide nondiscriminatory access to their OSS functionalities stands as a major impediment of local service resale. As a result, few competitive inroads have been made into the local exchange market across the nation. Indeed, data provided by the United States Telephone Association in this proceeding confirms that competitive LECs are at most slowing the rate of growth in access lines being experienced by incumbent LECs.

The proposed performance measurements and reporting requirements are neither excessively regulatory nor unduly burdensome. TRA submits that the deregulation the incumbent LECs claim as an entitlement under the Telecommunications Act was to be a product of the local

and other competition the statute was intended to engender. The continued need for regulatory oversight of the local market, and the burdens associated therewith, flow directly from the incumbent LECs' failure to have met their statutory responsibilities more than two years following enactment of the Telecommunications Act. Additional regulatory intrusion, accordingly, while once avoidable, is now necessary if market forces sufficient to discipline incumbent LEC behavior, and hence to allow for deregulation, are ever to emerge. Given that they occasioned the need for the Commission's adoption of performance measurements and reporting requirements by reason of their failure to carry out their statutory duties and have benefitted from that failure, however, incumbent LECs should not now be heard to complain about resultant costs and burdens.

In order to enhance the effectiveness of the performance data in revealing incumbent LEC performance in general and the treatment of smaller providers in particular, TRA recommends that the Commission:

- adopt a geographic reporting level more consistent with the manner in which service is provided by the incumbent LEC than state boundaries. Reporting should be market based, tailored to reflect internal incumbent LEC operational factors. To the extent uniform geographic reporting levels are necessary, however, metropolitan statistical areas ("MSAs"), subdivided where appropriate into local access and transport area ("LATA") components would be preferable to state boundaries, which would tend to mask performance deficiencies in specific markets.

- disaggregate measurements and reporting by individual carriers, and differentiate between affiliated and unaffiliated competitors, in order to avoid masking of dramatically different treatment of specific carriers in averaged results.

- disaggregate measurements and reporting by type of electronic interface, and include manual order submission in the calculus, in order to avoid masking inferior treatment of smaller providers which must rely upon less sophisticated interfaces – *e.g.*, graphic user interface ("GUI") – and/or manual processing by averaging these results with those associated with more sophisticated interfaces – *e.g.*, electronic data interexchange ("EDI")

- retain the measurement categories and level of data disaggregation -- including disaggregation by subfunction, competitive vehicle, type of customer, service complexity, dispatch requirement and billing type -- proposed in the *Notice*. As even such an ardent advocate as GTE Service Corporation ("GTE") concedes, "the Commission has struck a fair balance between producing information needed by CLECs and state commissions while limiting the burden on ILECs."

- provide for broad distribution of performance data to allow for not only sound public policy decisions by regulators, but sound business decisions by existing and potential competitors, as well as the investment community.

- employ statistical analyses to ensure that the performance data provides a meaningful portrayal of the experience of competitive LECs.

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REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c), hereby replies to selected comments submitted by various incumbent local exchange carriers ("LECs") and their representatives addressing the *Notice of Proposed Rulemaking*, FCC 98-72, released in the captioned proceeding on April 17, 1998 ("*Notice*"). In the *Notice*, the Commission proposes to adopt certain "model performance measurements and reporting requirements" designed to "illuminate the performance of incumbent local exchange companies" ("LECs") in, among other things, providing equivalent access to operations support systems ("OSS"), as well as operator services and directory assistance.[1] Not surprisingly, certain, but not all, incumbent LEC commenters oppose these model performance measurements and reporting requirements as, among other things, procedurally defective, jurisdictionally impermissible, completely unnecessary, excessively

[1] Notice, FCC 98-72 at ¶¶ 3-4.

regulatory, and unduly burdensome. TRA strongly disagrees with these assessments and urges the Commission to dismiss them as the all too predictable contentions of monopoly providers desperately seeking to mask their continuing failure to fulfill their statutory obligation to eliminate economic and operational barriers to competitive entry into their markets.

I.

INTRODUCTION

In its comments, TRA strongly supported the Commission's efforts to provide both regulators and new market entrants with the data necessary to evaluate the performance of incumbent LECs in meeting their Section 251 obligations. While it expressed its disappointment that the Commission elected not to adopt national, legally-binding performance measurement and reporting requirements, much less performance or technical standards, TRA recognized the importance of maintaining a cooperative working relationship between and among federal and state regulators and noted its belief that most state commissions will see the merits of uniform national performance measurements and reporting requirements and accept the Commission's guidance in this area, incorporating into their own oversight schemes the Commission's models. Noting its jurisdictional authority to do so, TRA nonetheless urged the Commission to stand by its commitment to adopt national, legally binding rules in the event that a threshold level of measurement and reporting uniformity is not achieved. TRA also urged the Commission to become a more pro-active participant in the seemingly interminable industry efforts to develop uniform technical standards for electronic OSS interfaces, mandating speedy compliance with whatever technical standards are ultimately adopted, and to assume a leadership role in forging with state regulators performance

standards that will serve as benchmarks against which the efficacy of incumbent LEC OSS functionality in facilitating the competitive provision of local exchange/exchange access service.

TRA generally supported the performance measurements proposed in the *Notice*, applauding the extent of the proposed measurement categories and the proposed level of disaggregation. TRA, however, urged the Commission to adopt a finer -- *i.e.*, market-based -- geographic level of reporting, to granularize reporting by individual competitors and specific OSS interfaces (including manual interfaces), and to expand the proposed availability of the resultant data. Finally, TRA supported the *Notice's* proposed use of statistical analyses to better evaluate an incumbent LEC's performance in providing nondiscriminatory access to OSS functions.

TRA here urges the Commission to hold firm in its resolve to "establish[] an objective manner through which an incumbent's compliance with its statutory obligations can be observed."[2] As the Commission has recognized, "[m]andating nondiscriminatory access" is a far cry from "achieving it in practice."[3] More than two years following enactment of the Telecommunications Act, no major incumbent LEC is providing nondiscriminatory access to OSS consistent with the requirements of Section 251(c) of the Communications Act. The Commission is correct that "[p]erformance measurements and reporting requirements should make much more transparent, or observable" the failure of the incumbent LECs to do so.[4] Increased visibility will, as the Commission has noted, "provide an important incentive for incumbent LECs to comply with the

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2 Id. at ¶ 5.

3 Id. at ¶13.

4 Id. at ¶ 14.

statutory nondiscrimination and just and reasonable requirements" by "increas[ing] the risk . . . [that] statutory violations [will be detected]."[5]

II.

ARGUMENT

A. The Commission has Ample Authority to Promulgate Model and/or Binding Performance Measurements and Reporting Requirements

A number of incumbent LEC commenters, most notably the Ameritech Operating Companies ("Ameritech") and BellSouth Corporation ("BellSouth"), challenge the Commission's jurisdictional authority to adopt even model performance measurements and reporting requirements.[6] In so arguing, these incumbent LECs seek to twist the holdings of the U.S. Court of Appeals for the Eighth Circuit ("Eight Circuit") in *Iowa Utilities Board v. FCC* so as to deny the Commission the right to act in areas "where Congress expressly called for the FCC's participation."[7]

The Eighth Circuit recognized that Congress "expressly called for the FCC's participation" with respect to, among other things, "subsections . . . 251(c)(4) (prevention of discriminatory conditions on resale) [and] 251(d)(2) (unbundled network elements)."[8] Moreover, the Eighth Circuit not only did not question the Commission's authority to adopt rules governing access to unbundled network elements and the availability of telecommunications services for resale,

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[5] Id. at ¶ 15.

[6] *See, e.g.*, Comments of Ameritech at 7 - 9; Comments of BellSouth at 2 - 5.

[7] 120 F.3d 753, 794 (8th Cir. 1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted sub. nom* AT&T Corp. v. Iowa Util. Bd, 118 S.Ct. 879 (U.S. 1998).

[8] Id. at 794, fn. 10.

but it let stand regulations specifically addressed to nondiscriminatory provisioning of network elements and resold services, as well as nondiscriminatory access to OSS functionality.

Thus, the Eighth Circuit upheld the Commission's jurisdiction to adopt rules governing the duty of incumbent LECs to make retail telecommunications services available for resale, including the authority to "restrict[] the ability of incumbent LECs to circumvent their resale obligations under the Act,"[9] and left intact the Commission's directive to incumbent LECs to "provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users."[10] And the Eighth Circuit not only acknowledged that it was for the Commission to, among other things, identify network elements that incumbent LECs must unbundle, specify in which instances network unbundling is technically feasible and necessary, and determine which services may be obtained through unbundled network access, but upheld the Commission's determination that OSS is a network element,[11] and let stand regulations that require "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including, but not limited to, the time within which the incumbent LEC provisions such access to unbundled network access shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."[12]

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9 Id. at 818 - 19.

10 47 C.F.R. § 51.603(b).

11 Iowa Utilities Bd. v. FCC, 120 F.3d 753 at 807 - 17.

12 47 C.F.R. § 51.313(b).

In short, the Eighth Circuit recognized that Congress intended for the Commission to adopt rules fully implementing Section 251(c)(3)'s and Section 251(c)(4)'s directives. Developing performance measurements and associated reporting requirements are no less a part of this implementation process than are determinations of the circumstances in which network unbundling is technically feasible and necessary or in which resale restrictions would allow incumbent LECs to circumvent their resale obligations. Each of these items directly impacts the extent to which the network unbundling and resale obligations imposed on incumbent LECs will serve to realize the "overriding goal" of the Telecommunications Act "to open all telecommunications markets to competition."[13] Thus, while the Eighth Circuit has (wrongfully) read the Telecommunications Act to preclude the Commission from "issu[ing] rules governing the specific rate determinations for the local competition provisions of the [Telecommunications] Act,"[14] it did not perceive any limitations on the Commission's jurisdictional authority to promulgate rules implementing Sections 251(c)(3) and 251(c)(4). It goes without saying that if the Commission has jurisdiction to promulgate rules implementing these statutory provisions, it has the authority to adopt nonbinding model performance measurements and reporting requirements.

B. The *Notice* is Procedurally Sound

BellSouth and Ameritech also launch a serious of obscure procedural assaults on the *Notice*. These incumbent LEC commenters object to the Commission's use of a rulemaking vehicle

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[13] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶ 10 (1997).

[14] Iowa Utilities Bd. v. FCC, 120 F.3d 753 at 819.

to propose model performance measurements and reporting requirements which will not be legally binding on state commissions or incumbent LECs.[15] It is suggested by these incumbent LEC commenters that this proceeding should be abandoned and a "notice of inquiry or some other genuinely informal proceeding . . . should be substituted."[16] TRA submits that these objections are frivolous, designed solely to engender further delay in creating mechanisms through which incumbent LEC failures to comply with their statutory obligations will be revealed.

Initially, it is well established that an administrative agency has substantial discretion in structuring its procedures, both generally and in a given instance.[17] As the U.S. Supreme Court has noted, an "agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence.'"[18] The key is whether parties received the process they were due under the law. "Once due process is satisfied, the amount and form of any additional process an agency wishes to provide is left almost entirely to its discretion."[19] Here, the incumbent LEC commenters find

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[15] Comments of Ameritech at 11 - 14; Comments of BellSouth at 5 - 6.

[16] Comments of BellSouth at 5.

[17] *See, e.g.,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544 - 45 (1978) (referencing "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure"); FCC v. Schreiber, 381U.S. 279, 290 (1965).

[18] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 at 544 (*citing* FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976)).

[19] Louisiana Assoc. of Ind. Producers and Royalty Owners v. FERC, 958 F.2d 1101,1115 (D.C. Cir. 1992).

themselves in the peculiar position of arguing that they were afforded more due process than they might other wide have been entitled -- hardly a compelling argument.[20]

Second, the Commission's election to proceed with a rulemaking vehicle in this instance makes eminent sense. While the Commission has tentatively proposed to limit its actions in the instant proceeding to the adoption of non-binding model performance measurements and reporting requirements, a number of commenters have urged the Commission to be far more aggressive. Moreover, the Commission itself has recognized that it may ultimately need to promulgate national, legally-binding rules. In either event, the Commission would need to follow notice and comment rulemaking procedures both to satisfy due process requirements and to develop "a more informed and comprehensive record upon which to decide whether to adopt national, legally binding rules."[21]

The motives underlying the procedural objections voiced by the incumbent LEC commenters are all too transparent. Simply put, the incumbent LEC commenters seek delay. In the absence of broadly-applicable performance measurements and reporting requirements, incumbent

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[20] The argument suggested by USTA (at 11 - 13) that the Commission may inadvertently promulgate binding rules simply by use of a rulemaking vehicle can be readily dismissed. Under the cases cited by USTA, whether a "guideline" will be deemed a rule will be determined by reference to both the intent of the promulgating agency and the degree to which the action "constrains the agency's discretion." *See* McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1320 - 21 (D.C. Cir. 1988); Western Coal Traffic League v. United States, 694 F.2d 378, 392 (5th Cir. 1982), *rehearing* 719 F.2d 772, *cert. Denied* 466 U.S. 953 (1983). Here, the Commission has made clear that it intends for its model performance measurements and reporting requirements to be non-binding. Moreover, the Commission has not in any way suggested that it intends to treat the models as a binding norm; indeed, it has indicated that additional proceedings would be required to achieve this end. Finally, the issue of rule or guideline is generally raised in the context of whether effected parties have received due process, an issue not present here. *See* McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 at 1322 - 23 (D.C. Cir. 1988).

[21] Notice, FCC 98-72 at ¶ 4.

LECs can still hide behind claims, such as those offered here by BellSouth, that competitive LEC claims of discrimination are "anecdotal."[22] Terminating this proceeding and issuing a notice of inquiry or initiating "some other genuinely informal proceeding" would ensure that the process would not only be slowed, but would require additional record-developing efforts in the event that the Commission ultimately concludes that national, legally-binding rules are necessary. Given the state of local competition more than two years following enactment of the Telecommunications Act, such additional delays cannot be afforded.

C. Performance Measurements and Associated Reporting Requirements are Not Only Necessary, but Critical

A number of incumbent LEC commenters have opined that the model performance measurements and reporting requirements are simply not necessary. For example, the United States Telephone Association ("USTA") attempts to paint a picture of rapidly emerging local exchange/exchange access competition, while BellSouth argues that there are no "serious, unrefuted allegations of broad discriminatory conduct."[23] In so arguing, the incumbent LEC comments rely upon an old Nixonian axiom -- a falsehood, no matter how outrageous, will become true if it is repeated often enough. The record simply does not support incumbent LEC claims of full statutory compliance driving vigorous local competition.

As TRA pointed out in its comments, those of its resale carrier members which have ventured into the local market report that two of three most serious impediments to their ability to

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22 Comments of BellSouth at 9.

23 Comments of USTA at 7 - 9; Comments of BellSouth at 9.

compete involve serious deficiencies in the service they receive from incumbent LECs – *i.e.*, (i) inadequate operations support systems, and (ii) the inferior service levels they recieve from incumbent LECs.[24] As a result, even though a majority of TRA's resale carrier members are providing, or attempting to provide, competitive local exchange service in 44 states, a number of the earliest entrants have already exited the local market, having concluded that the quality of local service which they were able to provide jeopardized existing relationships with their interexchange and other customers. For smaller carriers, deficiencies in OSS functionalities continue to thwart competitive efforts.

In each instance in which the Commission has been presented with purported evidence of incumbent LEC compliance with the mandates of Section 251 or of emerging local exchange/exchange access competition, it has found the showings lacking. BellSouth, for example, was specifically faulted less than six months ago for "fail[ing] to offer nondiscriminatory access to its OSS functions to competing carriers."[25] These deficiencies, which the Commission characterized as "major," were sufficient to "preclude competing carriers from being able to compete fairly with BellSouth and render it noncompliant with the competitive checklist."[26] Contrary to BellSouth's assertion that the evidence of its noncompliance with statutory mandates is at best "anecdotal," the

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[24] The third of the three principals obstacles to local service resale cited by TRA's resale carrier members was inadequate discounts or margins. Source: Telecommunications Resellers Association, "Member Survey of Local Competition," pp. 2, 4 (April, 1998).

[25] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), CC Docket No. 97-231, FCC 98-17, ¶ 21 (released Dec. 24, 1997), *recon. pending, appeal pending sub nom.* BellSouth Corporation v. FCC, No. 98-1087 (D.C.Cir. March 6, 1998).

[26] Id. at ¶ 22.

Commission, based on records developed with respect to the carriers performance in both South Carolina and Louisiana stated:

> We find in this proceeding, as we did in the *South Carolina Order*, that BellSouth's operations support systems fail to offer nondiscriminatory access to OSS functions for the pre-ordering, ordering, and provisioning of resale services. . . . BellSouth failed to establish that it is providing nondiscriminatory access for the ordering and provisioning of resale services because, among other things, (1) evidence in the record shows that a significant number of orders submitted by competing carriers via BellSouth's electronic interface are rejected, resulting in substantial delays in processing new entrant's orders in a timely manner. . . . BellSouth failed to provide . . . data establishing that it is offering nondiscriminatory access to the various operation support systems so that a competing carrier could provide service to its customers in substantially the same time and manner that BellSouth provides such service to its retail customers."[27]

Of course, BellSouth maintained with regard to its South Carolina and Louisiana operations, as it does here, that it provides nondiscriminatory access to OSS functionalities.[28]

Likewise, in each instance in which the Commission has confronted claims that meaningful competition has emerged, the opposite has proven to be the case. Thus, for example, in the State of Louisiana, the Commission noted the U.S. Department of Justice's ("DOJ") finding that the local market was "not 'fully and irreversibly open to competition,'" as well as DOJ's conclusion that "BellSouth faces no significant competition in local exchange service in Louisiana."[29] Of particular interest here, DOJ, which determined that "BellSouth's market share of local exchange in

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[27] Id. at ¶¶ 22 - 23 (footnotes omitted).

[28] *See, e.g.,* id. at ¶¶ 24, 29, 36.

[29] Id. at ¶ 18.

its service area is about 99.61% based on access lines,"[30] concluded that "the Louisiana market is not sufficiently open to competition because BellSouth has not instituted performance measurements to ensure consistent wholesale performance."[31]

Even in the State of New York, which is generally acknowledged to have the most competitive local market in the nation, competitive inroads are extremely limited. As the Consumer Federation of America found in a recent investigation of local exchange/exchange access competition:

> Restricting ourselves even to New York, we find that competition has gained a 3 percent market share, primarily in the business sector and at most 1 percent in the residential sector. This is overwhelmingly resale competition. Facilities-based competition, even in New York, is barely large enough to be considered rounding error. Most ironic is Bell Atlantic's claims that almost 5 billion minutes of use have been interchanged with competing carriers. Bell Atlantic New York handles over 150 billion minutes of use per year.[32]

Perhaps even more telling, data submitted by USTA in support of its claim that local exchange competition is flourishing actually shows otherwise.[33] USTA acknowledges that competitive LECs have to date secured only 1.5 million lines nationwide, or less than one percent

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[30] Evaluation of the Justice Department filed in CC Docket No. 97-231, Appx. B, p. 3 on December 10, 1997.

[31] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), CC Docket No. 97-231, FCC 98-17 at ¶ 18.

[32] Consumer Federation of America, Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996, 20 (January, 1998) (footnotes deleted).

[33] Comments of USTA at 8.

of the nearly 200 million access lines nationwide.[34] Indeed, given that the number of access lines nationwide is currently increasing at an annual rate in excess of four percent,[35] competitive LECs are merely slowing the rate of growth in access lines being experienced by incumbent LECs. Indeed, the Bell Operating Companies ("BOCs") alone reported an aggregate growth in access lines served by them in 1997 which is nearly four times larger than the number of lines competitive LECs collectively serve.[36] If USTA is correct and competitive LECs actually are serving 5 million access lines by the end of 1999, they will still not collectively serve the number of new lines added by the BOCs alone in just 1997.

In short, suggestions by incumbent LEC commenters that additional Commission initiatives are unnecessary to realize the Congressional goal of opening the local exchange/exchange access market to competitive entry have no foundation in reality.

D. The Proposed Performance Measurements and Reporting Requirements are Not Excessively Regulatory or Unduly Burdensome

A number of incumbent LEC commenters assert that the performance measurements and reporting requirements proposed in the *Notice* are excessively regulatory and unduly

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[34] Federal Communications Commission, *Preliminary Statistics of Communications Common Carriers*, Table 2.1 (1997 edition).

[35] Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, *Trends in Telephone Service,* Table 18.1 (Feb. 1998).

[36] Web sites of Ameritech (Annual Report 1997; 840,000); Bell Atlantic Corporation ("Bell Atlantic") (Annual Report 1997; 1.4 million new lines); BellSouth (Sourcebook 1997; 1,066,000 new lines); SBC Communications Inc. ("SBC") (Annual Report 1997, 1.6 million new lines); and U S WEST Communications, Inc. ("U S WEST") (News Release, 634,000 new lines).

burdensome.[37] These commenters complain about the cost of compliance and argue that additional regulatory requirements run contrary to the "de-regulatory spirit" of the Telecommunications Act.

TRA submits that the deregulation the incumbent LECs claim as an entitlement under the Telecommunications Act was to be a product of the local and other competition the statute was intended to engender. The continued need for regulatory oversight of the local market, and the burdens associated therewith, flow directly from the incumbent LECs' failure to have met their statutory responsibilities more than two years following enactment of the Telecommunications Act. Hence, put bluntly, the incumbent LEC commenters are not well positioned to complain about additional regulation or additional costs.

The "pro-competitive, de-regulatory national policy framework" established by Congress in the Telecommunications Act was designed to bring to the American public "advanced telecommunications and information technologies and services . . . by *opening all telecommunications markets to competition.*"[38] As the Commission has recognized, elimination of all economic and operational barriers to local market entry is critically important "to accomplishment

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[37] *See, e.g.,* Comments of BellSouth at 6 - 11; Comments of Ameritech at 9 - 18.

[38] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

of the Act's pro-competitive objectives."[39] Hence, the Commission has recognized that "vigilant[] and vigorous[] enforce[ment]" is vital "during the transition from monopoly to competition."[40]

The Commission has also recognized the importance of performance measurements and reporting requirements to achievement of pro-competitive Congressional goals. Thus, in elaborating upon matters of consequence to a determination of whether a given BOC application for in-region, interLATA authority is in the public interest, the Commission noted:

> [P]erformance monitoring (including performance standards and reporting requirements) . . . provides a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner . . . [and] establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market.[41]

While the Commission initially looked to "interconnection agreements with new entrants" to achieve these aims,[42] it has become apparent that this less aggressive approach will not achieve the desired results. For example, the Commission not only found that the performance

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[39] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 19 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 120 F.3d 820 (8th Cir. 1997), *cert. granted sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997), *pet. for cert. pending.*

[40] Id. at ¶ 20.

[41] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543, ¶ 393 (1997).

[42] Id.

measurements upon which BellSouth has relied were inadequate, but concluded that they could affirmatively "mask discriminatory conduct."[43] Moreover, while it is all well and good to theorize with regard to the ability of new market entrants to secure meaningful performance measurements and reporting requirements through negotiation, theory and reality seldom, if ever, converge when the new market entrant is a small resale provider. Small carriers have neither the economic clout to realize concessions through negotiation nor the financial staying power to force such results through arbitration from entities that are not only larger than they by orders of magnitude, but which have no "economic incentive" to bargain with entities which "come to the table with little or nothing the incumbent LEC needs or wants."[44]

Additional regulatory intrusion is necessary if market forces sufficient to discipline incumbent LEC behavior, and hence to allow for deregulation, are ever to emerge. Such enhanced regulatory activity will impose additional administrative burdens on, and create additional costs for, incumbent LECs. As noted above, however, these burdens and costs while now essential to realization of Congressional goals, were once avoidable. If, as they should be more than two years following enactment of the Telecommunications Act, local exchange/exchange access markets were "fully and irreversibly open to competition," there would be no need for new performance measurements and reporting requirements.

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[43] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), CC Docket No. 97-231, FCC 98-17 at ¶ 41 - 46.

[44] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 15.

Moreover, as TRA argued in its comments, any additional administrative burdens and costs the performance measurements and reporting requirements would create for incumbent LECs must be balanced against the adverse impacts the incumbent LECs' ongoing failure to comply with statutory requirements have had, and continue to have, on new market entrants, particularly smaller providers which the Commission has recognized have "less of a financial cushion than larger entities."[45] TRA also urges the Commission to consider in assessing the costs incumbent LECs claim they will incur to measure performance and report results, the additional profits incumbent LECs have made by hindering competitive entry into their monopoly bastions. One can only speculate how many of the nearly six million additional access lines the BOCs would have secured had they faced unhampered competition for those customers. As it is, each of the BOCs reported respectable gains in profits for first quarter 1998, with SBC (18.9 percent), BellSouth (14.3 percent), Bell Atlantic (10.7 percent), and Ameritech (10.4 percent) all posting double digit increases over first quarter 1996.[46]

Given that they occasioned the need for the Commission's adoption of performance measurements and reporting requirements by reason of their failure to carry out their statutory duties and have benefitted from that failure, incumbent LECs should not now be heard to complain about resultant costs and burdens.

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[45] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 61.

[46] "Earnings Steady for Telcos," Communications Today (April 30, 1998).

E. The Commission Should Not Dilute the Performance Measurements and Reporting Requirements to Placate Incumbent LECs

Virtually all of the incumbent LEC commenters urge the Commission to relax the performance measurements and reporting requirements proposed in the *Notice*. These commenters variously argue for lesser degrees of disaggregation as they relate not only to measurement categories and subcategories, but to geographic reporting levels, carrier-specific reporting, and electronic interfaces. These commenters also generally object to the use of statistical analyses to evaluate carrier performance and to all but the most narrow availability of performance reports. TRA urges the Commission to decline such invitations to further dilute the non-binding model performance measurements and reporting requirements proposed in the *Notice*.

TRA submits that the Commission has already made a major concession to the incumbent LECs by proposing only model, as opposed to legally-binding, performance measurements and reporting requirements. While TRA has endorsed this approach as the most practical means of producing an essential result, it clearly is not, from TRA's perspective, the preferable end. Mere models will likely generate many variations on a theme as individual states adopt their own performance measurements and reporting requirements. This diversity will increase for smaller carriers the burden inherent in evaluating performance data. The Commission should not render this situation worse by adopting model rules which will fail to produce meaningful results.

As the Commission has recognized, performance measurements and reporting requirements should achieve a number of important ends. Because they will, if properly structured, "make much more transparent, or observable, the extent to which an incumbent LEC is providing nondiscriminatory access," they should (i) "promote the goal of efficient and effective

communication between competing carriers and incumbent LECs," (ii) "provide an important incentive for incumbent LECs to comply with the statutory nondiscrimination and just and reasonable requirements," and (iii) reduce the need for regulatory oversight by encouraging self-policing among carriers."[47] The model performance measurements and reporting requirements will achieve none of these results unless the data they generate is meaningful.

TRA recommends that to achieve meaningful results, the Commission:

- adopt a geographic reporting level more consistent with the manner in which service is provided by the incumbent LEC than state boundaries. The experience of competitive LECs in the metropolitan New York City area will likely differ dramatically from that in the metropolitan Albany area which in turn will likely differ to an equally significant degree from that in western New York. As TRA recommended in its comments, reporting should be market based, tailored to reflect internal incumbent LEC operational factors. To the extent uniform geographic reporting levels are necessary, however, metropolitan statistical areas ("MSAs"), subdivided where appropriate into local access and transport area ("LATA") components would be preferable to state boundaries, which would tend to mask performance deficiencies in specific markets.

- disaggregate measurements and reporting by individual carriers, and differentiate between affiliated and unaffiliated competitors, in order to avoid masking of dramatically different treatment of specific carriers in averaged results.

- disaggregate measurements and reporting by type of electronic interface, and include manual order submission in the calculus, in order to avoid masking inferior treatment of smaller providers which must rely upon less sophisticated interfaces – *e.g.*, graphic user interface ("GUI") – and/or manual processing by averaging these results with those associated with more sophisticated interfaces – *e.g.*, electronic data interexchange ("EDI")

- retain the measurement categories and level of data disaggregation -- including disaggregation by subfunction, competitive vehicle, type of customer, service complexity, dispatch requirement and billing type -- proposed in the *Notice*. As even

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47 Notice, FCC 98-72 at ¶¶ 14 - 16.